

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ERNESTO HINOJOSA,	§	
TDCJ-CID #586249,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-05-1886
	§	
GARY JOHNSON, et al.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Plaintiff Ernesto Hinojosa's prisoner civil rights complaint was dismissed on October 20, 2006, after the court granted the defendants' summary judgment motion. (See Docket Entry No. 42.) On November 6, 2006, the court received a Motion/Request for Court's Memorandum Opinion and Order of October 20, 2006 and Re-Setting to File a Notice of Appeal "Deadline Date" (Docket Entry No. 44) in which Hinojosa asserted that he had not yet received a copy of the complaint from the officials who were responsible for delivery of the mail to prisoners. Several days later, Hinojosa submitted a letter (Docket Entry No. 45) instructing the court to disregard his request for court's Memorandum Opinion and Order stating that he had received it at a later date.

Hinojosa subsequently filed a Notice of Appeal (Docket Entry No. 48) and a Motion for Leave to Proceed on Appeal In Forma Pauperis (Docket Entry No. 46), both are dated November 8, 2006.

Included in the record is a certified copy of Hinojosa's trust fund account (Docket Entry No. 47), which was certified by a prison official on November 8, 2006. These documents were filed by the Clerk on November 27, 2006.

Liberally construed, Hinojosa's pleadings indicate that he seeks an extension of time to file a Notice of Appeal because he was not given timely notice of the district court's decision. Although a notice of appeal must be filed within thirty days of the entry of a final judgment, the district court may grant an extension where good cause or excusable neglect has been shown. FED. R. APP. P. 4(a)(5).

Prisoners such as Hinojosa must rely on their custodians to deliver legal correspondence to and from the courthouse. See Houston v. Lack, 108 S.Ct. 2379, 2382 (1988). Consequently, the Supreme Court has held that prisoners have filed timely notices of appeal if they have given them to prison officials for mailing within the prescribed period. Id. Hinojosa's Notice of Appeal was file stamped thirty-nine days after the entry of the Final Judgment. However, in addition to dating his Notice of Appeal within the required thirty-day period, Hinojosa has indicated that there has been some delay in delivery of court documents and has shown cause for any delay and is entitled to an extension of time. See Stevens v. Heard, 674 F.2d 320 (5th Cir. 1982). Therefore, the motion for extension of time (Docket Entry No. 44) will be granted, and the Notice of Appeal will be deemed to be timely filed.

Hinojosa has filed two Motions for Leave to Proceed on Appeal In Forma Pauperis. (Docket Entry Nos. 46 and 51) Having examined Hinojosa's Unsworn Declaration in Support of Motion for Leave to Proceed on Appeal In Forma Pauperis and a certified copy of his Inmate Trust Fund Account History (Docket Entry No. 47) the court has determined that Hinojosa is entitled to proceed as a pauper.

Hinojosa is assessed an initial partial filing fee of \$4.00. The agency having custody of appellant shall collect this amount from the inmate's trust account when funds are available and forward it to the court.

Thereafter, Hinojosa shall pay \$451.00, the balance of the filing fee, in periodic installments under 28 U.S.C. § 1915(b)(2) until the entire appellate filing fee, \$ 455.00, has been paid. This amount shall be collected from the inmate's trust account and forwarded by the institution to the court.

Hinojosa's first Motion for Leave to Proceed on Appeal In Forma Pauperis pursuant to 28 U.S.C. § 1915 (Docket Entry No. 46) is **GRANTED**.

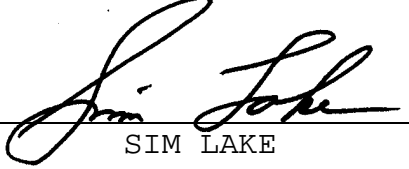
Hinojosa's subsequent pauper's motion (Docket Entry No. 51) is **DENIED as moot**.

Hinojosa's motion for extension of time (Docket Entry No. 44) is **GRANTED**.

The Clerk shall mail a copy of this Order to the Inmate Trust Fund, P.O. Box 629, Huntsville, Texas 77342-0629, and to TDCJ

Office of the General Counsel, P.O. Box 13084, Capitol Station,
Austin, Texas 78711, FAX No. 512-936-2159.

SIGNED at Houston, Texas, on this 1st day of December, 2006.


SIM LAKE
UNITED STATES DISTRICT JUDGE